United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2032

To be argued by
JOAN P. SCANNELL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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RICHARD DAVID,

Petitioner-Appellant,

-against-

J.W. PATTERSON, Superintendent,
Eastern Correctional Facility,

Respondent-Appellee.

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BRIEF FOR RESPONDENT-APPELLEE

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BRIEF FOR RESPONDENT-APPELLEE

Petitioner-appellant appeals from a decision of the United States District Court, for the Southern District of New York (Wyatt, J.) dated November, 1975 denying petitioner-appellant's application for a federal writ of habeas corpus.

Questions Presented

1. Whether petitioner's statement to Security Guard Barcene was a spontaneous and volunteered statement rendering Miranda v. Arizona, (384 U.S. 436) inapplicable to such a statement.

2. Assuming arguendo that petitioner's confession to the Security Guard was inadmissible whether petitioner's subsequent confession to the police was voluntary and free of any taint from the prior allegedly inadmissible confession and whether the claim of taint was raised in the District Court.

3. Assuming arguendo that college security guards are required to give Miranda warnings whether any error which resulted from the failure to give petitioner such warnings, was harmless beyond a reasonable doubt.

Statement of Facts

A. The Crime

On October 20, 1971, Jack Schaffer, a divinity student at Union Theological Seminary, was approached on St. Nicholas Terrace by two men (79-85). They surrounded Schaffer, put a knife to his stomach, and demanded his money (85,86,108). As Schaffer reached into his pocket, the man with the knife put the weapon into his pocket (86, 109). At this point Schaffer pushed past the two men and fled.

Two City College Security guards, John Mitchell and Harry Murray, saw the confrontation from their passing car (126,127,145,157,192,193). Two guards gave chase, and one of the guards, Arion Barcene, captured one of the would be robbers, who later proved to be petitioner, crouched in a darkened hallway (215-217). A subsequent search revealed that petitioner was carrying a knife (217).

Petitioner was brought to an office on the City College campus. After being asked his name and address, petitioner stated to security guard Barcene that it was "lucky I got caught" because he had "done some before" and "unfortunately

he got caught now" (226). Barcene then asked petitioner if he had ever mugged other students on St. Nicholas Terrace, and petitioner responded in the affirmative (227).

Approximately one quarter of an hour later, petitioner was taken to the police station. There petitioner was given his Miranda rights. Petitioner stated he understood these rights and was willing to talk to the police (236-240). Petitioner claimed he didn't know his accomplice and didn't know his accomplice was going to pull a knife (242-244).

B. Prior Proceedings

Before trial, petitioner sought to suppress statements made to security guard Barcene. The motion was made on the ground that the guards, not being police officers or peace officers [CPL § 1.20(33),(34)], were obligated, under CPL § 140.40, to turn custody of any arrested person over to the police without unnecessary delay (60-1). It was contended that any statement made during a protracted "citizen's arrest" was therefore governed by the Fifth Amendment (61-2). The assistant district attorney explained that no more than

fifteen minutes elapsed between petitioner's apprehension and the time he was turned over to the police, and contended that in any event the Fifth Amendment had no application to private guards (61). The court ruled that no grounds were asserted which would warrant suppressing the statement (63-4). A motion to strike the testimony on the same ground was made at the end of the trial (335-6). There followed another motion for the same relief on the ground that anyone who makes an arrest under § 140.40 is an agent of the police and therefore required to warn the prisoner of his constitutional rights (337-8). The court refused to strike the testimony on either of these grounds (336-7,338-9).

The motion to suppress the statement made to the police was made on the ground that petitioner had been interrogated in violation of Miranda v. Arizona, 384 U.S. 436 (1966) (4-5,21-2). At a hearing, Detective Sullivan testified that prior to asking petitioner any questions, he had warned the defendant that he had the right to remain silent, that anything he said could and would be used against him, that he had the right to an attorney during questioning, and to a court-appointed lawyer if he could not afford one (14-5). Petitioner acknowledged that he understood these rights, and agreed to speak with Sullivan (15). The defense called no

witnesses and the court accpeted the uncontradicted testimony of Sullivan, denying the motion and ruling, inter alia, that the contents of the statement were irrelevant to that determination (26-8).

After trial by jury, petitioner was found guilty of attempted robbery in the first and second degrees. Petitioner was sentenced on August 29, 1972, to five to fifteen years.

In March, 1974 the Appellate Division remanded the case for a hearing on the voluntariness of petitioner's statements to Detective Sullivan. A new hearing was held in April, 1974, and the Appellate Division affirmed the judgment of conviction. Leave to appeal to the State Court of Appeals was denied in November, 1974.

In August, 1975, petitioner filed a petition for federal habeas relief, alleging only that the college security guards were required to give Miranda warnings. On November 19, 1975, the United States District Court for the Southern District of New York, (Wyatt, J.), denied the application. The opinion of the District Court is reproduced in petitioner's appendix.

C. The Trial

At trial the victim, Jack Schaffer a divinity student, testified that on October 20, 1971 while walking to the subway he was approached by two men (84-5). The men followed Schaffer and moved in front of him. One of the men displayed a knife and ordered Schaffer to go into a building. Since the door to the building was locked the men then backed Schaffer against the wall and demanded his money (84-86). As Schaffer reached into his pocket one of the men put his knife away. At this point Schaffer pushed past the two men and fled (86,110). At this moment two college security guards were driving by. One of the guards, John Mitchell, saw Schaffer approached by the two men. As Schaffer moved away from his assailants one of the guards called to Schaffer who quickly confirmed that the two men had tried to rob him (87,127,145-6 174-6,190-4). Schaffer got into the car and the guards moved towards the would-be robbers (127-8,177). As the robbers ran into an alley two guards chased them. Schaffer and the other guards drove around the corner and saw the two guards, Murray and Barcene, chase one of the men into a building (88, 96-8,179-81,214). Both Murray and Barcene testified at trial that they were sure that the man they chased was petitioner. Barcene then discovered petitioner crouched in a

darkened hallway (215-7). Petitioner was then searched and a knife was found in his pocket (134,182-3,205,217). Petitioner was brought to a City College office where Barcene took down his name and address (230). Petitioner stated that it was "lucky I got caught" because he had "done some before (226) Barcene then asked petitioner how many students he had mugged before, to which petitioner replied that he had robbed other students on St. Nicholas Terrace but unfortunately he had now gotten caught (227). Petitioner was then brought to the police station where he was arrested by Detective Sullivan and advised of his rights. Petitioner acknowledged he understood his rights and was willing to speak (240-1). Petitioner was then asked the identity of the man who was with him during the robbery. Petitioner claimed he didn't know because he had just met the man in the street. Petitioner also denied pulling a knife (243-4).

Petitioner testified that he was on St. Nicholas Avenue buying cigarettes when he met an acquaintance from his days of narcotics use (265-9). He walked with him to 128th Street at which point a car screeched to a halt, and petitioner's acquaintance fled. Petitioner then saw about four

men running towards them (270-1). Petitioner testified that he remembered that there were a lot of people who dealt in drugs in the area so in order to avoid involvement petitioner fled. Petitioner claimed that the security guards beat him (279-80). Petitioner stated that he never admitted the robbery although he testified that he had in fact committed at least one other robbery in the same area of Manhattan (289-90,294-5). Petitioner then stated that he was taken to the police station where he was warned of his right to remain silent (228). Petitioner claimed that he carried a knife in connection with his job as a truckers helper but in cross-examination he admitted that prior to getting the trucking job he had carried a knife during the commission of another robbery (295-6). Petitioner also admitted on cross-examination that he had never notified the Department of Social Services of his employment and therefore received welfare payments despite his gainful employment. Further, petitioner did not file a tax return to reflect his income on this job (308-310).

POINT I

PETITIONER'S STATEMENT TO SECURITY GUARD BARCENE WAS A SPONTANEOUS AND VOLUNTEERED STATEMENT. MIRANDA V. ARIZONA, (384 U.S. 436) IS INAPPLICABLE TO SUCH A STATEMENT.

Most of petitioner's brief consists of a lengthy discussion of the question of whether a security guard at a city college is required to give Miranda warnings in the same circumstances as are regular police officers. This entire discussion is completely unnecessary, since the statements made to security guard Barcene were spontaneous and volunteered statements to which the strictures of Miranda v. Arizona, 384 U.S. 436 (1966) do not apply.

The statement by petitioner that he "had done some before" and was "lucky I got caught" was clearly an unsolicited, volunteered remark. It followed a question by the security guard which only requested petitioner's name and address which is permissible pedigree questioning. United States ex rel. Hines v. LaVallee, 521 F. 2d 1109 (2d Cir. 1975). When Barcene asked petitioner if he had mugged other students in the area, he was obviously simply continuing a conversation begun by petitioner and following up directly on the remark made by

petitioner that he had "done some before".

The United States Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966) specifically recognized that such solicited and volunteered statements are admissible. The Supreme Court said:

> "Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today" (emphasis added). 384 U.S. at 478.

Miranda does not say that volunteered statements are admissible only if warnings have been given or counsel retained. It states that volunteered statements of any kind are admissible if not the product of interrogation. Accord United States v. Augello, 452 F. 2d 1135, 1141 (2d Cir. 1971) cert. den. 406 U.S. 922 (1972); United States v. Vigo, 487 F. 2d 295 2d Cir. 1973, United States v. Purin, 486 F. 2d 1363, 1368 (2d Cir. 1973).

Although petitioner claims the statement at issue here occurred as the result of an "interrogation", it is clear from the record that Barcene was not conducting an interrogation or an inquisition. The record clearly indicates that petitioner initiated a casual conversation. The conversation was short, and was confined to the general subject raised by petitioner. Barcene asked no questions about the crime itself and petitioner volunteered no information about the crime. Petitioner's statements were clearly not the product of an interrogation or inquisition, but were simply spontaneous, off-hand, off the cuff remarks. The courts have repeatedly upheld the admissibility of such statements in such situations. See People v. Kaye, 25 N Y 2d 139 (1969); People v. Torres, 21 N Y 2d 49 (1967); People v. Robles, 27 N Y 2d 155 (1970).

Assuming arguendo that Barcene's lone non-pedigree question should have been preceded by Miranda warnings, it is difficult to see any prejudice in admitting into evidence petitioner's response to the question. Once petitioner spontaneously volunteered that he had "done some before" it was surely of little significance to the verdict that the "some" included other students. Moreover, the trial court subsequently charged

that petitioner's past crimes could be considered only on the question of credibility (390).

Petitioner's claim that the statements made to Barcene must be suppressed fails for the additional reason that it was petitioner's own trial counsel who insisted on bringing all the statements out before the jury. The prosecutor had attempted to limit Barcene's testimony to petitioner's first remarks in response to Barcene's pedigree questions; however it was petitioner's attorney who insisted that "he tell us everything" (226).

It is clear that both petitioner's initial volunteered statement to the security guards and the subsequent statements brought out by defense counsel on cross-examination were admissible. Thus the state law question of whether security guards are peace or police officers under New York law is not in issue here.*

* The Trial Court ruled that according to the statute, college security guards were private persons (338). The New York statutory definition of both peace officers and police officers does not include security guards be they hired by the City, State or by private persons, Criminal Procedure Law § 1.20(33). This interpretation of state law by a state court is entitled to acceptance by this Court. The final expositors of state law are the state courts. England v. Louisiana Board of Medical Examiners, 375 U.S. 411, 415 (1964), and the federal courts tread on "treacherous ground" when exploring questions of state law. Brady v. Maryland, 373 U.S. 83, 90 (1963).

POINT II

ASSUMING ARGUENDO PETITIONER'S CONFESSION TO THE SECURITY GUARD IS INADMISSIBLE, PETITIONER'S SUBSEQUENT CONFESSION TO THE POLICE WAS VOLUNTARY AND FREE OF ANY TAINT FROM THE PRIOR ALLEGEDLY INADMISSIBLE CONFESSION. MOREOVER THE CLAIM OF TAINT WAS NEVER RAISED IN THE DISTRICT COURT.

Petitioner claims that his subsequent confession to the police was tainted by his prior allegedly inadmissible confession to the college guards. This claim is without merit.

At the outset it should be noted that petitioner did not raise this claim or one remotely similar in the Court below. Even allowing for a liberal construction of pro se habeas corpus applications petitioner should not be permitted to raise wholly new issues on appeal, especially in light of the fact that the District Court was deprived of an opportunity to even superfically consider these issues.

Petitioner states in his brief at p. 23 fn. 1 that although the "precise formulation" of the above claim was

not raised in the Court below, he did claim illegality of his first confession. Petitioner mistakenly believes that if this first confession is deemed involuntary the second confession is automatically rendered involuntary. This is not the law. Assuming arguendo that petitioner's first confession was involuntary an independent determination must be made to determine whether the police were the beneficiaries of the pressure applied by the first allegedly illegal interrogation. United States v. Bayer, 331 U.S. 532 (1947). In the case at bar it is clear that the District Court was not afforded an opportunity to consider this issue.

Assuming arguendo that the question of taint is properly before this Court a review of the merits reveals that petitioner's claim is spurious.

The law is clear that even if a prior confession is involuntary, it does not thereby taint all subsequent confessions. As the Supreme Court stated in United States v. Bayer, supra at 540, ". . .this Court has never gone so far as to hold that making a confession under circumstances

which preclude its use perpetually disables the confessor from making a usuable one after those conditions have been removed." Accord, United States v. Knight, 395 F. 2d 971 (2d Cir. 1968); Knott v. Howard, 378 F. Supp. 1325 (D. Rhode 1974), affd. 511 F. 2d 1060 (1st Cir. 1975).

Rather than presume the illegality of a subsequent confession because of a prior involuntary one, the test is whether the later confession is voluntary. Myers v. Frye, 401 F. 2d 18 (7th Cir. 1968). The voluntariness of the second confession is not a question of law but one of fact to be determined on the totality of the circumstances. Clewis v. Texas, 386 U.S. 707, 708 (1967).

In cases with facts considerably more onerous than the case at bar, the courts have found subsequent confessions voluntary. In United States v. Knight, supra, which is analogous to the case at bar, the defendant made certain admissions to local authorities, during an interrogation, without being given Miranda warnings. A short while later the defendant repeated the admissions to an F.B.I. agent after receiving proper warnings. The defendant claimed that his second admission was tainted by the former. The Court citing

United States v. Bayer, supra, stated at 975, "that an admission once made should not in itself always be fatal." Contrary to petitioner's contention, if an admission is made during an illegal interrogation, subsequent warnings are not rendered ineffective to dissipate the taint. The Court in Bayer stated that a second confession's admissibility ". . . depends upon the 'causal relationship' between the earlier unconstitutional nterrogation by the local police and the later incriminating statement. . .The ultimate issue is whether the federal authorities were the beneficiaries of the pressure applied by the local in custody interrogation. Westover, 384 U.S. at 497, 86 S.Ct. at 1639."

In upholding the admissibility of the defendant's statement to the F.B.I., the Court found at 975 that "the 'compelling pressures' which concerned the Supreme Court in Miranda were absent." The Court distinguished Westover v. United States, 384 U.S. 436 (1966) in that in Westover prior to receiving any warnings, the defendant was interrogated continuously for fourteen hours.

The case at bar involves a situation more analogous to the one in United States v. Knight, supra, than to the coercive atmosphere in Westover v. United States, supra. Petitioner was questioned for a brief period, and only after he had spontaneously volunteered that he had "done some before" and it

was lucky he had gotten caught. Thus, it is clear that petitioner's admissions instead of being a product of coercion were a voluntary choice on petitioner's part. There was absolutely no pressure applied by the security guards and thus the police could not have possibly been the beneficiaries of any pressure.

POINT III

ASSUMING ARGUENDO THAT COLLEGE SECURITY GUARDS ARE REQUIRED TO GIVE MIRANDA WARNINGS ANY ERROR WHICH RESULTED FROM THE FAILURE TO GIVE PETITIONER SUCH WARNINGS, WAS HARMLESS BEYOND A REASONABLE DOUBT.

If any error resulted from the failure on the part of the college security guards to give petitioner Miranda warnings it was indeed harmless error. Petitioner's initial and most damaging statement to the security guards that he was lucky he had gotten caught because he had done same before (226), was totally spontaneous and admissible under Miranda v. Arizona, supra, see Point I. Likewise, petitioner's second confession which was preceded by proper warnings was alone sufficient for a conviction.

Disregarding both of petitioner's admissions, the evidence against him was still overwhelming. Two of the security guards testified that they saw the attempted robbery from their passing car (126,127,145,157,174,192,193). The guards gave chase and one of the guards Arion Barcene found petitioner crouched in a darkened hallway (215-217). Moreover, the search of petitioner revealed he was carrying a knife which the victim testified was the same type that was held to his stomach (90-1,110).

Petitioner claims that the District Court erred in it's determination of harmless error. In support of this claim petitioner points to the victims inability to positively identify him. Yet petitioner neglects to mention that both security guards testified at trial that they were certain that petitioner was the man they chased from St. Nicholas Terrace into the building on St. Nicholas Terrace (184,187,214-5). The allegation of a gap in the testimony seems even more absurd since petitioner himself testified that the guards in fact chased him into the building on St. Nicholas Avenue (271-3). Finally the victim testified that the reason he couldn't identify the man was because he was only interested in escaping without injury and kpet his eye on the knife.

Finally petitioner's own defense testimony was incredible at best. Petitioner claimed that he was walking with a friend from his narcotics days, when suddenly four men started to run towards him (270-271). Petitioner then fled to avoid any involvement in possible narcotics dealings. Petitioner explained his possession of the knife as necessary for his job as a trucker's helper yet on cross-examination admitted that prior to his present job he had committed another robbery with a knife (295-6). Thus a review of the record in the case at bar clearly reveals that any error which resulted in the admissions of either of petitioner's statements was harmless beyond a reasonable doubt. As the Supreme Court stated in Milton v. Wainwright, 407 U.S. 371, 377-378 (1972) "The writ of habeas corpus has limited scope; the federal courts do not sit to retry cases do nova but rather, to review for violations of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the State court. . ." Accord, Chapman v. California, 386 U.S. 18, 24 (1967); United States ex rel. Ross v. LaVallee, 448 F. 2d 552 (2d Cir. 1971); Harrington v. California, 395 U.S. 250 (1969). The evidence of petitioner's guilt of this heinous crime was indeed overwhelming.

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
June 7, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
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JOAN P. SCANNELL
Deputy Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

John P Scannell, being duly sworn, deposes and says that She is employed in the office of the Attorney General of the State of New York, attorney for respondent herein. On the 7 day of June, 1976, She served the annexed upon the following named person :

Mr David Goldberger Esq
Federal Defenders of N.Y.
509 U S Courthouse
Foley Sq NY 10007

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

John P Scannell

Sworn to before me this
7 day of June, 1976.

Assistant Attorney General
of the State of New York